

6 Official Opinions of the Compliance Board 145 (2009)

Administrative Function – Within Exclusion – Briefing of school board on approval of contract by superintendent solely for informational purposes

Administrative Function – Outside Exclusion – Briefing of school board on approval of contract by superintendent if school board's consent required

Minutes – Generally – Public entitled to assume that approved minutes of public body are accurate

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The Open Meetings Compliance Board has considered your complaint that the Anne Arundel County Board of Education (“County Board”) violated the Open Meetings Act on February 4, 2009, when it closed its meeting to consider a non-competitive procurement matter. For the reasons explained below, we can offer only a qualified conclusion. If under the County Board’s procedures, the contract was presented to the County Board solely for informational purposes, the Open Meetings Act did not apply. However, if the County Board’s concurrence was required, consideration in closed session would have violated the Act.

I

Complaint and Response; Supplemental Record

According to the complaint, on February 4, 2009, the County Board voted to go into a closed session, relying, in part, on § 10-508(a)(14),¹ “[to] discuss

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

a matter directly related to a negotiation strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” Citing the publicly-available minutes of February 18, the complaint stated that during this closed session, two employees of the County Board “answered Board questions on the procurement matter relating to student information.”

The complaint indicated that the subject of discussion was the school system’s desire to purchase “a \$4 million student data system without using a competitive bidding process or soliciting proposals for a new computer system.” At some point around March 27, 2009, after the contract had been awarded, the County Board posted a document on its BoardDocs website confirming that a competitive process was not used. The complaint noted that a meeting may be closed pursuant to § 10-508(a)(14) only in connection with a competitive procurement. The complaint alleged that, because this contract did not involve a competitive procurement, the County Board violated the Act in conducting the closed session under § 10-508(a)(14).

In a timely response on behalf of the County Board, Tyson Bennett, Esquire, reported that the County Board’s minutes reporting on the February 4 closed session were incorrect. Mr. Bennett attended the closed meeting on February 4, and consistent with his regular practice, kept his own brief notes of the meeting. Those notes, included with the response, reflect that the Superintendent of Schools reported to the County Board on the status of the upgrade of the student information system and identified the topic as involving an administrative function. According to Mr. Bennett’s recollection, Dr. Pish and Ms. Gilbert, members of the Superintendent’s staff, were present but said little or nothing. Citing 3 *OMCB Opinions* 39 (2000), the response characterized the discussion as “communications from the Superintendent on administrative matters ... under authority of the Superintendent.” And citing 1 *OMCB Opinions* 133 (1995), the response argued that, even if members of the County Board discussed the matters in their meeting with the Superintendent, that discussion did not render the “communications outside the ambit of administrative functions.” Furthermore, the response noted that the complainant’s exhibit captioned “Agenda Item for the Board of Education” indicated that it was submitted for the “review” rather than the “action” of the County Board.

Following receipt of the County Board's response, we requested that Mr. Bennett provide us with additional information so that we could evaluate whether this matter did qualify as an administrative function. In response, Mr. Bennett provided a County Board policy which provides, in part, that "...non-competitive procurements ... will be approved by the Purchasing Officer and reported to the Board for their review." The response noted that the upgrade contract was non-competitive. Included with the response was a policy delegating purchasing authority to the Superintendent or Purchasing Officer and an additional policy delegating to the Purchasing Officer the right to approve contracts on behalf of the Superintendent. The response also included the initial page and signature page of the contract. Finally, the response included amended minutes for the February 4 closed session identifying the upgrade to the student information system.

II

Analysis

The complaint focused on a violation of § 10-508(a)(14) based, in part, on the publicly-available minutes of February 18, 2009, addressing the February 4 closed meeting. However, we are told that the minutes were incorrect and that the issue considered February 4 actually involved an administrative function. Thus, our focus is on the administrative function exclusion of the Act. Nevertheless, the error in the minutes ought to have been identified before the minutes were approved. The public is entitled to assume that the minutes of a public body are accurate.

When a public body such as the County Board engages in an administrative function, provisions of the Open Meetings Act generally do not apply. § 10-503(a)(1)(i).² We have frequently recited a two-part test for determining whether a particular matter before a public body qualifies as an administrative function. First, we inquire whether the topic falls within the definition of any alternative defined function. If so, analysis stops because, by definition, it could not qualify as an administrative function. If it does not involve an alternative function, we then ask whether the public body was involved in the

² Exceptions are cases where the public body is engaged in granting a license or permit or in any zoning matter. Furthermore, if a public body recesses an open meeting to carry out an administrative function as a closed session, the public body must disclose certain information pertaining to the closed session in the minutes of the public body's next meeting. *See* § 10-503(b) and (c).

“administration” of an existing law, rule, or regulation. If not, the topic does not qualify as an administrative function. *See, e.g., 6 OMCB Opinions* 53, 55 (2008).

In an earlier opinion that was cited in the response, we reviewed at considerable length the administrative function exclusion under the Act in the context of a local board of education. *3 OMCB Opinions* 39 (2000).³ We identified discussions where the superintendent of schools or the superintendent’s staff shared information with the school board involving administrative matters under the authority of the superintendent. *3 OMCB Opinions* at 42. We noted that these matters did not appear to involve policy matters that would be addressed by the school board, but rather the sharing of information with the school board. We viewed this practice as consistent with the school board’s responsibility in overseeing the superintendent’s performance. *Id.* at 42 - 43. Of course, if the superintendent or staff was advising a school board on a contractual matter and the proposed contract or contract modification could not be given effect absent school board approval, it could not be considered an administrative function. The school board would be involved in a quasi-legislative function as defined by the Act. § 10-502(j)(3); *3 OMCB Opinions* at 44, n. 5.

According to the County Board’s agenda item, the contract for the computer upgrade was submitted for “review.” (The form included three selections: information, action, and review). Purchasing authority had been delegated to the Superintendent⁴ and subdelegated to the Purchasing Officer. We acknowledge that no signature of a County Board member appeared on the signature page submitted with the supplemental response. As we understand the County Board’s position, no action by the County Board was required. If this is the case, we would agree that the County Board’s involvement in this matter did not involve a quasi-legislative action, but was indeed an administrative function. If it qualified as an administrative function, the Open Meetings Act would not require that it be handled in a public meeting. Stated otherwise, except for the subsequent reporting requirement, (which was

³ At the time that opinion was issued, the Act referred to an “executive function” rather than “administrative function.” The term “administrative function” resulted from legislation enacted as Chapter 584, laws of Maryland 2006. However, this was merely a change in nomenclature rather than a change in substance.

⁴ Even absent a delegation, a contract made by a local school board requires the written approval of the school superintendent. Education Article, § 4-205(d), Annotated Code of Maryland.

reflected in the February 18, 2009, minutes albeit under the incorrect statutory authority), the Open Meetings Act did not apply. Even if members of the County Board asked questions about the procurement, the nature of the County Board's involvement would not have mattered.

However, we note that the policy referenced in the County Board's supplemental policy is not entirely clear. While the response focuses on the delegation language relating to non-competitive procurements, the paragraph referenced concludes that, "[t]he Superintendent is directed to obtain Board concurrence with non-competitive additions."⁵ If the County Board's approval was required either during the February 4 meeting or at any other point before the amended contract could be given effect, the County Board's involvement would have constituted a quasi-legislative function and the County Board should have handled the matter in an open meeting in accordance with the Act.⁶

III

Conclusion

Given that our role is limited to interpretation of the Open Meetings Act and a definitive resolution involves the proper interpretation of education law and policies of the County Board delegating procurement authority, the best we can offer is a qualified conclusion.⁷ If under the County Board's procedures, the contract was presented to the County Board solely for

⁵ The provision of the DEA-Purchasing Procedures Policy, dated May 2, 2007, that was referenced in the response provides:

All contracts exceeding \$25,000, commodities, and non-competitive procurements, that are in compliance with the Bidding Procedures Regulations, will be approved by the Purchasing officer and reported to the Board for their review. The Superintendent is directed to obtain Board concurrence with non-competitive additions.

⁶ If the County Board's approval was required, consideration during an open meeting would also have been consistent with the Education Article, § 4-107(d), Annotated Code of Maryland.

⁷ The Open Meetings Act recognizes that there will be instances where the Compliance Board may not resolve a complaint. § 10-502.5(f)(2).

informational purposes, the Open Meetings Act did not apply. However, if the County Board's concurrence was in fact required, the Act would have applied and consideration in closed session would have violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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